

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 745 of 1993

with

CRIMINAL APPEAL No 602 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and

MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

GAMECHA VAGHRI KALU AMTHA

Appearance:

1. Criminal Appeal No. 745 of 1993

MR AJ DESAI, APP, for Petitioner

MR KG SHETH for Respondent No. 1

2. Criminal AppealNo 602 of 1994

MR KG SHETH for Petitioner

MR AJ DESAI, APP, for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and

MR.JUSTICE A.L.DAVE

Date of decision: 14/09/98

ORAL JUDGEMENT (Per A.L. Dave, J.)

1. Learned Additional Sessions Judge, Bhavnagar, in Sessions Case No.201 of 1992 before him, passed a judgment and order on 17th April, 1993, against original accused Gamecha Vaghri Kalu Amtha, who was being tried for offences punishable under Sections 302, 447 and 504 of Indian Penal Code and Section 135 of the Bombay Police Act, acquitting him of offences of murder, etc. but convicting him under Section 304 Part-II of Indian Penal Code.

2. Being aggrieved by the said judgment and order, State of Gujarat has preferred Criminal Appeal No.745 of 1993 for enhancement of sentence by convicting the original accused for murder, whereas the original accused and respondent in Appeal No.745 of 1993 has preferred Criminal Appeal No.602 of 1994, challenging his conviction.

3. Since both these appeal are cognates, arising out of the same judgment and order, they are both heard together and are disposed of by this common judgment.

4. The facts leading to the lodging of F.I.R., filing of charge sheet and trial can be narrated in a narrow compass as follows. The incident took place on 7th June, 1992 at about 3.00 A.M. at village Nari of Bhavnagar taluka of Bhavnagar district. The complainant, deceased-Ramuben, lodged an F.I.R. with the police stating that on 7th June, 1992, at about 3.00 A.M., the accused came to her place and gave her a Gupti blow in the stomach. She also alleged that the accused had used abusive language in the course of transaction. On the basis of the F.I.R., an offence was registered and the matter investigated upon by the police. The investigating agency, having found that there is sufficient evidence to connect the accused with the offence, filed charge sheet for murder of Bai Ramuben as she, ultimately, succumbed to the injuries. As the offence was triable exclusively by Court of Sessions, the matter was committed to the Court of Sessions and the learned Sessions Judge, in turn, transferred the matter to the Additional Sessions Judge. The accused pleaded not guilty to the charge against him and expressed his desire to face the trial. The accused, ultimately, came to be convicted by the learned Additional Sessions Judge after considering the evidence on record, under Section 304 Part-II of Indian Penal Code and was sentenced to undergo rigorous imprisonment for seven years. He was also fined Rs.1000/- and was directed to undergo simple

imprisonment for six months in case of default in payment of fine. Set off for the imprisonment undergone by the accused as undertrial prisoner was also directed to be given. Being aggrieved by the said judgment and order recording conviction under Section 304 Part II of Indian Penal Code instead of Section 302 of Indian Penal Code, the State has preferred Criminal Appeal No.745 of 1993, whereas the accused has preferred Criminal Appeal No.602 of 1994 and prayed for acquittal.

5. We have heard Mr. A.J. Desai, learned Additional Public Prosecutor for the State. Mr. Desai submitted that the learned Additional Sessions Judge has taken a lenient view. If the injury in light of the evidence as to the occurrence is considered, the offence could never have attracted the provision of Section 304 Part-II. The accused was armed with a deadly weapon like Gupti. He went to the house of the deceased at an odd hour and assaulted her with Gupti causing such injury that ultimately resulted into the death of the deceased. The action of the accused, therefore, was the outcome of a pre-planned and premeditated offence. The accused had a motive against the deceased as can be seen from the evidence that, in the previous evening, there was some dispute between the accused and the deceased. If these aspects were considered in their correct perspective by the learned Additional Sessions Judge, the conviction could not have been under Section 304 Part-II of Indian Penal Code. Mr. Desai, therefore, urged that the appeal preferred by the State against the conviction under Section 304 Part II, I.P.C. may be allowed, the judgment and order recording conviction under Section 304 Part II, I.P.C. against the respondent may be set aside and the respondent may be convicted under Section 302, I.P.C.

6. Mr. Sheth, learned advocate appearing for the original accused, submitted that the learned Additional Sessions Judge has not taken into consideration the fact that the F.I.R. and the dying declaration given by the deceased and the oral evidence of the witnesses speak only of Kalu Amtha, who was Vedva Vaghri, whereas, in fact, the accused is Gamecha Vaghri. Mr. Sheth, in his alternative submission, submitted that even if that is not accepted, the incident has occurred as a result of excitement suffered by the accused and it cannot be considered as a premeditated crime committed by the accused and, therefore, if this Court accepts that part, the conviction under Section 304 Part-II cannot be considered as erroneous and the appeal by the State may, therefore, be dismissed.

7. We have gone through the record and proceedings of the case. Considering the F.I.R. lodged by the deceased, Ex.32 and her dying declaration before the Executive Magistrate, Ex.24, it is amply clear that the incident has occurred at 3.00 A.M. in the morning. The accused has gone to the house of the deceased equipped with a Gupti with which he caused vital injury to the deceased, to which the deceased, ultimately, succumbed. It is true that in the F.I.R., Ex.32, the deceased has referred to the accused Kalubhai Amthabhai as Vedva Vaghri and the accused claims to be belonging to Gamecha Vaghri community. But if the evidence in the entirety is weighed, it is amply clear that the doubt that is tried to be raised as to whether the assailant was Kalu Amtha Vedva Vaghri or Kalu Amtha Gamecha Vaghri does not survive. The reasons are that, there are two eye-witness named Ujiben Dhirubhai, Ex.27 and Dhirubhai Kalubhai, Ex.28, who both have seen the incident and have identified the assailant. They identify the accused as the assailant before the Court as well. No suggestion in this regard is made during cross-examination to either Ujiben or Dhirubhai that the assailant was a different Kalu Amtha belonging to Vedva Vaghri community and not the accused. The suggestion that accused-Kalu Amtha was not the assailant has been denied by both the witnesses firmly. Apart from this, if the dying declaration, Ex.24, is seen, the deceased has described the assailant as Kalu Amtha, who stays about 2-3 houses away from her own house and it is nobody's case that there is some Kalu Amtha belonging to Vedva Vaghri community staying 2-3 houses away from the house of the deceased and, therefore, there cannot survive any doubt about the identity of the accused and him being the assailant. The learned Trial Judge has also rightly come to the same conclusion.

8. Now, the question whether the case against the accused would fall under the provisions of Section 302 or Section 304 Part-II needs to be considered.

9. The learned Trial Judge has observed that considering the overall evidence, it is amply clear that the blow was given (injury was caused) with an intention of causing death of the deceased. The medical evidence also supports the case of the prosecution that the fatal injury was possible with Gupti. We fully agree with the conclusion arrived at by the learned Trial Judge that the prosecution has successfully proved the criminal act of causing death of deceased by the accused. We also agree with the observation of the learned Trial Judge that the injury was caused by the accused with an intention of

causing her death. However, the learned Judge seems to have come to the conclusion that the offence would be punishable under Section 304 Part-II for the reason that the doctor has admitted in his evidence that, if immediate treatment was given, the deceased could have been saved and because no surgery was performed and only sutures were taken, it cannot be said that proper treatment was given and that if treatment was given, the deceased could have possibly survived. The offence would, therefore, be punishable under section 304 Part II and not 302 of Indian Penal Code. This, in our view, seems to be a clear error of law. If explanation to Section 299 of Indian Penal Code is considered, it is amply clear that, if death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skillful treatment, the death might have been prevented. Therefore, it cannot be said, if surgical treatment was given, the death could have been prevented and because that is not done, the death has resulted out of the injury and, therefore, it would not be a murder, particularly when there is a clear conclusion, correctly made by the trial Court in its judgment, that the injury was caused by the accused with intention of causing death of the deceased.

10. Further, while scanning the evidence, we have found that the case is not even suggested to be falling under any of the exceptions enumerated in Section 300 of Indian Penal Code. The argument of Mr. Sheth that the accused was excited at the relevant time, as can be seen from the F.I.R., Ex.32, and would attract exception No.IV of Section 300 also cannot be accepted. It is nobody's case that the accused gave the blow in heat of passion upon a sudden quarrel or in a sudden fight. No suggestion is even put to any witness and no such defence is taken in the statement under Section 313 of Code of Criminal Procedure.

11. At this point of time, Mr. Sheth urges that even exception I to Section 300 would be attracted. If that provision is perused, the present case would not fall under that exception either for the reason that again, it is nobody's case that the accused was deprived of power of self-control by grave and sudden provocation. There appears not an iota of evidence to indicate any provocation least grave and sudden being caused to the accused. The argument of Mr. Sheth, therefore, cannot be accepted. Therefore, in our view, considering the evidence on record, the learned Additional Sessions Judge was in error in coming to the conclusion that the accused

can be convicted under Section 304 Part II of I.P.C. and not 302 of I.P.C.

12. Considering the fact that the accused went to the house of the deceased at 3 o' clock in the morning, considering that he was equipped with a Gupti, considering that he gave a Gupti blow on vital part of the body of the deceased, considering that there was no opposition, no provocation coming from the deceased, and considering that the injury was sufficient in ordinary course of nature to cause death, which ultimately, resulted into death of the deceased, there cannot be any hesitation for coming to a conclusion that the accused has deliberately caused fatal injury to the deceased and would, therefore, be punished under Section 302 of Indian Penal Code. We, therefore, deem it necessary to modify the judgment and order of the learned Trial Judge in Sessions Case No.201 of 1992 only to that extent.

13. In the result, the judgment and order impugned in these appeals is, therefore, modified to the extent that the original accused stands convicted under Section 302 of Indian Penal Code instead of Section 304 Part-II.

14. We have heard learned Additional Public Prosecutor, Mr. Desai and learned advocate, Mr. Sheth, on sentence. The original accused is ordered to undergo life imprisonment and further ordered to pay a fine of Rs.1000/- or to undergo further imprisonment for two months in case of default in payment of fine. Non-bailable warrant be issued against Gamecha Vaghri Kalu Amtha. Criminal Appeal No.745 of 1993 is, accordingly, allowed. Criminal Appeal No.602 of 1994 stands dismissed.

[J.N. BHATT, J.]

[A.L. DAVE, J.]

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